Nos. 368, 369, 370

In the Supreme Court of the United States

OCTOBER TERM, 1944

GEMSO, INC., ET AL., PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

MILDRED MARETZO, ET AL., PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

JOSEPHINE GUISEPPI, ET AL., PETITIONERS

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR [1]

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The principal opinion below (R. 189–219) was written by Judge Frank. Judge Learned Hand delivered a concurring opinion (R. 219–221). Judge Swan delivered a dissenting opinion (R.

[1] Together with No. 369, *Mildred Maretzo, et al., Petitioners* v. *L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor*, and No. 370, *Josephine Guiseppi, et al., Petitioners* v. *L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor.*

ample, the Department of Labor issued a wage order in 1938 establishing minimum wages for women and minors in the wearing apparel and accessories industry and, in order to safeguard the minimum, the wage order included a term prohibiting industrial homework. The wage order covered "embroidery operations" performed on underwear, handkerchiefs, infants' and children's clothing, women's dresses and gift novelties. The manufacturers of these articles experienced no difficulty in bringing homeworkers into the factories, and the Rhode Island industry has continued to grow. (R. 140.)

Conditions in the embroideries industry generally and in each of its branches also indicate specifically that the members of the industry will not encounter any great difficulties in adjusting their methods of doing business to the prohibition of industrial homework, and that they will not suffer undue hardship or competitive disadvantage. Contrary to the contention of Gemsco and the other military embroiderers, there will be no decrease of production. "The evidence in the record not only does not support any such contention, but indicates rather that production of these types of embroidery may be stimulated and increased." (R. 152.)

From the foregoing subsidiary findings and from all the evidence, the Administrator drew two conclusions of decisive importance in the present case. He concluded that a prohibition of

homework in the embroideries industry was necessary to safeguard the 40 cent minimum wage (R. 154)—

> that it is necessary, in order to carry out the purposes of the minimum wage order for the Embroideries Industry, to prevent the circumvention or evasion thereof, and to safeguard the [40-cent] minimum wage rate prescribed therein, to include terms and conditions in the order which shall provide that no work in the Embroideries Industry shall be done in or about a home, apartment, tenement or room in a residential establishment * * * [except in certain specified extraordinary cases].

He also concluded that the prohibition of homework would not cause substantial difficulties (R. 137, 152, 152–153)—

> I have considered all the evidence relating to adjustment to the factory system of manufacture and find that this adjustment can reasonably be made without undue hardship upon home workers or home work employers.
>
> * * * * *
>
> I have already found that prohibition of home work will not involve any substantial difficulties in the Industry.
>
> * * * * *
>
> Prohibition of home work will not prohibit any type of work or occupation but will merely compel the transfer of work

> and occupations formerly carried on in the homes to the factory where the workers may be adequately supervised and their payment in accordance with the minimum wage order for the Industry guaranteed. The possibilities of adjustment to a prohibition of home work which are disclosed by the record furnish ample assurance that no substantial curtailment of operation will result. All of the operations in question are performed in the factory as well as in the home.

Thereupon the Administrator approved the 40-cent minimum wage recommended by the industry committee and issued the wage order under review.

IV. PROCEEDINGS IN THE CIRCUIT COURT OF APPEALS

After promulgation of the wage order, petitioners filed petitions for review of the order in the circuit court of appeals, pursuant to Section 10 of the Act, challenging the power of the Administrator to include in the order the terms prohibiting homework (R. 7–32). Petitioners conceded that such provisions were necessary to prevent evasion of the wage order and to safeguard the wage rate therein established but denied that there was power to deal with the evil. The circuit court of appeals affirmed the wage order in all respects (R. 225–226).

SUMMARY OF ARGUMENT

The purpose of the wage order for the embroideries industry is to raise the minimum wage in the industry to 40 cents an hour. The prohibition of homework is directed exclusively to the effectuation of this end. In this industry a 40 cent minimum wage order, without a prohibition of homework, would be a nullity because it could not be enforced. The validity of the prohibition, therefore, must be judged not as if the prohibition were an independent measure promulgated because home work is an evil but as an indispensable means of safeguarding the minimum wage.

The prohibition is authorized by Section 8 (f) of the Act, which empowers the Administrator to include in wage orders "such terms and conditions" as he finds "necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein." The authority delegated by this Section is limited only by the language quoted. Congress could not catalogue all the devices or practices that would circumvent a wage order or answer the detailed questions of judgment and policy involved in determining in each situation what enforcement measures would be appropriate. For these reasons, Section 8 (f) leaves to the Administrator the task of determining what terms and conditions are to be included in each wage order for

a particular industry for the purpose of preventing its frustration. In the embroideries industry, the Administrator has found that the practice of distributing homework would render the 40 cent minimum wage rate a nullity. He has also concluded that the prohibition "will not involve any substantial difficulties in the industry" (R. 152). These findings are not challenged. Upon making them, the Administrator had, under the express language of Section 8 (f), not only the power but also the duty to include in the wage order the prohibition in question.

The background and legislative history of the Act bear out this conclusion. At the time the Fair Labor Standards Act was before Congress, it was fully understood that in some industries the practice of distributing industrial homework resulted in such widespread evasion of minimum wage laws that the rates could not be made effective unless homework was abolished or sharply curtailed. At various stages in the course of the bill through Congress, Congress illustrated the kinds of terms authorized by Section 8 (f) by listing some of them in a parenthetical clause. The prohibition of homework was included in the illustrations. For example, the Senate bill provided that labor standards orders should contain "such terms and conditions (including the restriction or prohibition of industrial home work or of such other acts or practices) as the Board

finds necessary to carry out the purposes of the order and prevent the circumvention or evasion thereof * * *." In Conference, this "illustrative application of the general principle" (*Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95, 100) was omitted, but its prior mention shows beyond dispute that a prohibition of homework is a term or condition of the kind which Congress intended by Section 8 (f) to authorize the Administrator to include in a wage order whenever he finds it to be necessary to prevent evasion. The opposing argument—that the omission worked a substantive change—is not persuasive. The Conference Committee omitted at the same time the entire parenthetical phrase contained in the Senate bill. Surely, it did not by the deletion signify that the Administrator was to have no power to prohibit any acts or practices leading to evasion. Neither does the parallel omission of the reference to homework have any such significance.

Petitioner contends that Congress provided no method for enforcing the prohibition of homework and that therefore, Congress cannot have intended to authorize the prohibition. But Section 17, which confers on the district courts "jurisdiction * * * to restrain violations of section 15", provides for such enforcement. The choice of remedies to be used in enforcing the restraint is left to the discretion of the equity court in accordance with the normal practices. Non-

payment of the wage rates fixed by a wage order is a violation of Section 15 and, therefore, in exercising their "jurisdiction" to restrain such non-payment, the courts may enforce by decree all the provisions in a wage order which the Administrator has found necessary to ensure that the minimum wage rate will be paid.

It is also said that the Administrator will have no power to prohibit industrial homework seven years after the effective date of the Act and that therefore Congress cannot have intended him to have the power during the seven year period. Assuming the premise, we submit that the conclusion does not follow. Under Section 8 (f) all evasive acts and practices stand on the same footing, and the absence from Section 6 of any analogue expressly authorizing the Administrator to regulate practices evasive of the statutory rates, surely does not show that Congress intended Section 8 (f) to be wholly nugatory. The Act was a compromise between the Senate plan for administrative regulation of wage rates and the House scheme for fixing rigid statutory minima without provision for wage orders. It would not be surprising, therefore, to find that the power given to the Administrator in connection with his authority to issue administrative wage orders was not conferred in those parts of the bill which were drawn from the proposal to fix rigid statutory rates without administrative action. The absence of perfect symmetry is not sufficient reason for

deleting Section 8 (f) from the statute. Neither does it give any ground for reading Section 8 (f) to give the Administrator less power to deal with the distribution of homework than he has to prevent other evasive practices.

We submit, moreover—although we think the question need not be decided—that wage order prohibitions of industrial homework will not become ineffective seven years after the effective date of the Act. At the time of enactment, Congress must have realized that, before the the expiration of seven years, the Administrator, following the scheme of Section 8, would have covered all industries with wage orders and have included in them many terms and conditions necessary to prevent evasion of the wage rates established. Section 8 (e) which provides that "No order" shall continue in effect after the expiration of the seven year period was not intended to accomplish the absurd result of striking down all the terms and conditions necessary to make the wage rates effective and to leave the Administrator powerless thereafter to prevent evasion except as he might obtain the assistance of equity. The legislative history of Section 8 (e) shows plainly that its only purpose was to guarantee that attainment of the goal of a universal minimum wage of 40 cents an hour would not be delayed by administrative inertia after the expiration of the seven year period. The intention of Congress can and should be carried out by reading Section 8 (e) as applicable

only to those provisions of wage orders which specify the wage rates and as not applicable to the enforcement provisions with which Section 8 (e) is in no substantial sense concerned. *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U. S. 315.

ARGUMENT

I

THE WAGE ORDER FOR THE EMBROIDERIES INDUSTRY IS VALID IN ALL RESPECTS

The purpose of the wage order for the embroideries industry is to raise the wage rates in the industry, in accordance with Section 8 of the Act, to "the highest minimum wage rates [not in excess of 40 cents an hour] * * * which * * *, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry" (Section 8 (b)). The provision of the wage order prohibiting homework is directed exclusively to safeguarding the minimum wage rate. The Administrator emphasized in his findings that he had confined himself to the question of the effect of homework on the minimum wage rate and had not taken into account its other social and economic evils (R. 75–76).[5] As Judge Frank pointed out,

[5] The Administrator stated (R. 75–76):

> This proceeding is not concerned with the question whether home work is desirable or undesirable from a social point of view or as a form of economic organization. It is concerned solely with whether the home

"This is not a case, then, where an effort is being made to utilize § 8 (f) as a subterfuge to achieve an independent end outside the scope of the Act; the regulation here is a means of accomplishing the purpose of an authorized wage order by stopping evasions of that order * * *. Nor, in view of the Administrator's findings, can it be said that this is a case where the means are so disproportionate to the authorized end that they cease to be means except in form and in truth become an independent end not contemplated in the Act." (R. 197–198.) The sole question, therefore, is whether the Administrator had power to include the prohibition of homework as a subsidiary term or condition necessary to prevent evasion of a lawful order establishing the 40 cent minimum wage.

A. *The prohibition of industrial home work was authorized under Section 8 (f) as a necessary incident to establishment of the 40-cent minimum wage.*

Section 8 (f) of the Fair Labor Standards Act provides:

> Orders issued under this section * * * shall contain such terms and conditions as

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work system in the Embroideries Industry furnishes a means of circumventing or evading a wage order putting into effect the minimum wage recommendation of Industry Committee No. 45 so that it is necessary to provide in the wage order for its regulation, restriction, or prohibition in order to carry out the purposes of such order and to safeguard the minimum wage rate established therein.

> the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. * * *

Thus, all that Section 8 (f) requires as prerequisite to the inclusion of any term or condition in a wage order is that the term be found "necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein."

In the instant case, the Administrator made such a finding. He found that the prohibition was an indispensable means of preventing evasion of the 40-cent minimum wage rate, and that the industry could make the necessary adjustments without "undue hardship" or "substantial difficulties" (R. 134, 137, 152). He then concluded, in the precise words of Section 8 (f), that (R. 154)—

> * * * it is necessary, in order to carry out the purposes of the minimum wage order for the Embroideries Industry, to prevent the circumvention or evasion thereof, and to safeguard the [40 cent] minimum wage rate prescribed therein, to include terms and conditions in the order which shall provide that no work in the Embroideries Industry shall be done in or about a home, apartment, tenement or room in a residential establishment * * *

[except in certain specified extraordinary cases].

The validity of this finding seems clear. Petitioners do not dispute its correctness. By not bringing the evidence to the court below, they waived any contention that it lacks an adequate basis. *Railroad Comm.* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 392, 398, 401. The evidence, moreover, as shown by the subsidiary findings in the record (R. 75–155), does in fact amply support the Administrator's ultimate finding that the unrestricted distribution of industrial homework would render meaningless any order aimed at establishing a 40 cent minimum wage rate in the embroideries industry.

It follows that the term prohibiting industrial homework was validly included in the wage order under review. Section 8 (f) does not qualify the authority expressly delegated to the Administrator to include in wage orders "such terms and conditions as the Administrator finds necessary * * *". It cannot be read to authorize some necessary incidental provisions and to deny recourse to others that are equally essential. Congress, which must have realized that a great variety of terms, including terms prohibiting homework, were used to implement state wage orders,[9] charged the Administrator

[9] Previous prohibitions of industrial homework to implement state minimum wage legislation are discussed at pp. 36–41, *infra*. Other terms and conditions which the States

with the duty of including any "necessary" terms or conditions. The Administrator found the prohibition of industrial homework to be "necessary". That finding is true beyond question. Therefore the provision is within the statute.

In making this contention we assume, of course, that Section 8 (f) implicitly limits the terms and conditions that a wage order may include to those that are truly incidental to safeguarding the wage rate; doubtless a danger of evasion may not be used under that section as an excuse for regulating some distinct subject in such a way that the resulting term or provision is out of all proportion to protection of the wage rate. But what is an independent subject and what is appropriate for incidental regulation depends on questions of fact and degree, and ultimately on decisions of policy, all of which are primarily for the Administrator's sense of proportion. Congress could not catalogue all the devices or practices that would circumvent the purposes of a wage order. Neither could Congress answer the detailed questions of judgment and policy involved in determining in each situation what enforcement measures would be appropriate. Congress met these difficulties by leaving the adapta-

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have found necessary for enforcement deal with tipping, charges for facilities, charges for uniforms, waiting time, posting of orders, *et cetera*.

tion of means to end to the empiric process of administration. For these reasons, Section 8 (f) delegates to the Administrator the task of determining what terms and conditions should be included to prevent the frustration of specific orders for particular industries.

In promulgating the wage order in question the Administrator fairly discharged his duty. He kept in proper perspective the means and the end to be attained. He considered not only whether the prohibition was essential to the prevention of evasion but also whether it was too disruptive a method of safeguarding the wage rate to be properly related to that authorized object. After reviewing the evidence, he found that the practice of distributing work for employees to do in their homes made it impossible, because of the very nature of homework, to secure for them payment of the minimum wage rate fixed by the order (R. 130, 134). He then inquired into the consequences of a prohibition of homework, obviously with a view to determining whether the practice of distributing work to employees in their homes rather than bringing them to shops or factories was so important to employers and homeworkers in the industry as to make it improper to deal with the subject in one of the incidental provisions of the wage order (R. 136–153). He found that it was not so important. While in terms of enforcement of the minimum wage rate

and of the indirect social gain, the consequences of prohibition are tremendous, nevertheless, in terms of the importance of home work to the industry, any disturbing consequences of a prohibition are comparatively small. The prohibition does not forbid the pursuit of any particular occupation. It does not outlaw any particular kind of embroidery or working technique. It does not restrain former homeworkers from seeking continued employment in the embroidery industry. It permits all who wish to do so to take employment in a factory or workshop. The prohibition relates exclusively to the place where work may be performed (R. 152). In the case of persons who are unable to accept such employment because of age, or physical or mental disability, or inability to leave home, the order makes provision for special homework certificates. The basic questions before the Administrator, therefore, in seeking to determine whether the effect of prohibition upon the industry would be too radical to permit its use as a means of stopping evasion, were whether adequate space would be available for workshops and whether the workers would make the shift. After hearing testimony based on experience and expert knowledge (R. 136–153; see pp. 15–16, *supra*), the Administrator concluded that the evidence showed that both the employers and employees can readily adjust themselves to the requirement that all work be done in shops and

factories where payment of the minimum wage can be assured: "prohibition of home work will not involve any substantial difficulties in the Industry" (R. 152); the necessary adjustments "can reasonably be made without undue hardship upon home workers or home work employers" (R. 137). In view of these underlying determinations, the Administrator's formal finding, stated in the words of Section 8 (f) (R. 154), must be regarded as the expression of his conclusion (a) that the prohibition is absolutely necessary to safeguard the minimum wage established by the order and (b) that the practice of employing workers in their homes rather than in shops or factories is of no such consequence to the embroideries industry as would render its prohibition an inappropriate method of preventing evasion of the 40 cent minimum wage.

The latter portion of the finding, no less than the former, is binding in this proceeding for review (see *supra*, p. 27). When Judge Swan stated that the prohibition " 'will disorganize and make over the industry, break up much family economy, and produce conditions which cannot possibly adjust themselves' for a considerable period of time" (R. 223), he fell into the error of substituting his own judgment as to the consequences of the prohibition. But the Administrator had already considered petitioners' claims that the prohibition was too drastic and had determined

that their fears were unfounded (R. 151, 152). What was said by this Court in *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 194, is apposite here—

> * * * in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy * * *.

The *Phelps Dodge* case involved a quasi-judicial hearing. But the considerations there adverted to "are especially appropriate where the review", as here, "is of regulations of general application adopted by an administrative agency under its rule-making power in carrying out the policy of a statute with whose enforcement it is charged." *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, 228. Cf. *Morgan*

Stanley & Co. v. *Securities Exchange Commission*, 126 F. (2d) 325, 332 (C. C. A. 2); *Gray* v. *Powell*, 314 U. S. 402; *Stewart & Bro.* v. *Bowles*, 322 U. S. 398. Under Section 8 (f), the relation of means to end—the preservation of a proper proportion—is the task of the Administrator.

For the foregoing reasons we submit that the plain words of Section 8 (f), read in the light of the general principles of administrative law, demonstrate that no part of the wage order under review should be set aside. Certainly, on the facts disclosed by this record, the term eliminating homework is within the provision authorizing the Administrator to include "such terms and conditions as" he finds "necessary to carry out the purposes of such orders, to prevent circumvention or evasion thereof, and to safeguard the minimum wage rates established therein." These unqualified words could be limited only by a strong showing that Congress did not intend them to be given their full scope. As we demonstrate hereafter, no such showing can be made.

B. *The background and legislative history of the Act show affirmatively that Congress, by enacting Section 8 (f), intended to authorize a necessary prohibition of industrial home work.*

The background of social and economic thought from which the Fair Labor Standards Act emerged, supports our interpretation of Section 8 (f). The long struggle to remedy the unsanitary sweat-shop conditions under which urban

homeworkers and their children were forced to work in poverty for unending hours, not only creating a constant threat to their own and their children's health and well-being but also spreading disease to those who bought their goods [10] has

[10] *Homework in the Tenements*, by Elizabeth C. Watson, reprinted from The Survey, New York, of February 4, 1911 by the National Consumers' League; *Manufacturing in Tenements*, Preliminary Report of the Factory Investigating Commission, No. 30, State of New York, pp. 87–91 (1912); *Artificial Flower Makers*, by Mary Van Kleeck, Secretary, Committee on Women's Work, Russell Sage Foundation, pp. 222–223 (1913); *Industrial Home Work in Massachusetts*, Labor Bulletin No. 101 (Being Part V of the Annual Report on the Statistics of Labor for 1914), pp. 6, 21–22, Bureau of Statistics, The Commonwealth of Massachusetts; *The Manufacture of Army Shirts under the Home Work System. Jeffersonville, Indiana.* Committee on Women in Industry of the Advisory Commission of the Council of National Defense, Women in War Industries Series, No. 1, p. 24 (July 1918); *Industrial Home Work in Pennsylvania*, by Agnes Mary Hadden Byrnes, prepared through the co-operation of the Department of Labor and Industry, Commonwealth of Pennsylvania, the Consumers' League of Eastern Pennsylvania, and the Carola Woerishoffer Graduate Department of Social Economy and Social Research, Bryn Mawr College, pp. 56–89 (1920); *Home Work in Bridgeport, Connecticut*, Bulletin No. 9, Women's Bureau, United States Department of Labor, p. 6 (December 1919); *Tenement Home Work and a New Bill Initiated by the Women's City Club and the City Club of New York (1921)*; Report on *Manufacturing in Tenements* Submitted to the Commission to Examine the Laws Relating to Child Welfare, by Bernard L. Schientag, Industrial Commissioner, New York State Department of Labor, pp. 4–5, (March 1924); *Some Social and Economic Aspects of Home Work*, Special Bulletin No. 158, Bureau of Women in Industry, New York State Department of Labor, pp. 31–32, 34–40 (February 1929); *Homework in the Connecticut Lace Industry*, Minimum Wage Division, Connecticut State Department of Labor and Fac-

had two aspects. The first, the necessity quite apart from minimum wage legislation for abolishing homework to remove its threat to health, safety and child welfare, is not strictly relevant here.[11] What is both relevant and highly important is the second aspect, the need in some industries for regulating or prohibiting industrial homework in order to make minimum wage laws

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tory Inspection, pp. 8–9, 15–20 (November 1933); *Industrial Home Work; Summary of the System and its Problems*, Women's Bureau, United States Department of Labor, pp. 1–3 (July 1934); *Three Cents an Hour*, Bureau of Women and Children, Department of Labor and Industry, Commonwealth of Pennsylvania (1936); *The Commercialization of the Home Through Industrial Home Work*, Bulletin No. 135, Women's Bureau, United States Department of Labor, pp. 17–26, 33–34 (1935); *Industrial Home Work in Chicago*, by Ruth White, The Social Service Review, University of Chicago Press, Vol. X, pp. 23–58 (1936); *Industrial Home-Work Conditions in the Candlewick-Bedspread and Lace Industries*, Children's Bureau, United States Department of Labor, pp. 2–4 (May 1941); *Home Work in the Glove Industry in New York State*, Division of Women in Industry and Minimum Wage, New York State Department of Labor, Vol. I, pp. 191–193 (May 1941); *An Industry Adjusts; a study of the adjustment of the artificial flower industry to homework order no. 3*, Division of Women in Industry and Minimum Wage, New York State Department of Labor, pp. 1–3, 5, (June 1941); see also *Industrial Home Work in the United States*, by Frieda S. Miller, International Labour Review, Vol. XLIII, No. 1, pp. 1–50 (January 1941); *Labor Problems in American Industry*, by Carroll R. Daugherty (Houghton Mifflin Co.) (1941, fifth ed.), pp. 222–224; *Labor Problems and Labor Law*, by Albion Guilford Taylor (Prentice-Hall, Inc.) (1938), pp. 411–416; *Labor's Progress and some Basic Labor Problems*, The Economics of Labor, Vol. I, by Harry A. Millis and Royal E. Montgomery (McGraw-Hill Book Co., Inc.) (1938) pp. 397–402.

[11] Acts and Resolves of Massachusetts (1937), Ch. 429, Sec.

effective. When the Fair Labor Standards Act was before Congress, it was fully understood that in such cases minimum wage regulation could not be successful unless, an an ancillary measure, the practice of distributing industrial homework was abolished or sharply curtailed.[12] In other words,

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144, illustrates this type of regulation. It provides:

> The manufacture of any of the following by industrial home work shall be unlawful, and no permit issued under section 147, or certificate issued under section 147A shall be deemed to authorize such manufacture or the delivery of materials for such manufacture: tobacco; drugs and poisons; bandages and other sanitary goods; explosives, fireworks and articles of like character; articles, the manufacture of which by industrial home work is determined by the commission, after investigation and hearing in a manner provided by sections 145 and 146 to be injurious to the health or welfare of the industrial home workers within the industry or to render unduly difficult the maintenance of existing labor standards * * *

See also Ill. Rev. Stat. (1941) Ch. 48, Secs. 251–260; Laws of Pennsylvania (1937), Act. No. 176, Secs. 1, 4; Vernon's Texas Statutes, Cum. Supp. (1939), Tit. 12, Ch. 11, Art. 782a, Secs. 2, 3; Wisconsin Stats. (1937), Secs. 103.44, 103.69 and 146.03.

[12] *Industrial Home Work in Massachusetts*, Labor Bulletin No. 101 (Being Part V of the Annual Report on the Statistics of Labor for 1914), pp. 30–31, Bureau of Statistics, The Commonwealth of Massachusetts; *Industrial Homework and its Regulation in Massachusetts*, by Ethel M. Johnson, Assistant Commissioner, Massachusetts Department of Labor and Industries, pp. 3, 13 (1927); *Homework in the Connecticut Lace Industry*, Minimum Wage Division, Connecticut State Department of Labor and Factory Inspection, pp. 15–18 (1933); *Industrial Home Work in Pennsylvania under the*

it was well established, even then, that a prohibition or restriction upon homework was one of the terms or conditions which it might be necessary to include in the minimum wage orders for some industries in order to make the orders effective.

N. R. A., Bureau of Women and Children, Gertrude Emery, Director, Pennsylvania Department of Labor and Industry, pp. 16–22 (March, 1935); *Industrial Home Work in Rhode Island*, Bulletin No. 131, Women's Bureau, United States Department of Labor, pp. 10–15 (1935); *Industrial Home Work under the N. R. A.*, Publication No. 234, Children's Bureau, United States Department of Labor, pp. 13–18 (1936); *Report of the Wage Board of the Jewelry Manufacturing Industry to L. Metcalfe Walling, Director of Labor, Rhode Island*, (January 4, 1937); *Homework in the Artificial Flower and Feather Industry in New York State*, Special Bulletin No. 199, Division of Women in Industry and Minimum Wage, New York State Department of Labor, pp. 15–16, 72–75 (1938); *Current Status of Industrial Home Work in the Women's and Children's Apparel Industry*, Research and Statistics Branch, Wage and Hour Division, United States Department of Labor, pp. 100–103 (March, 1942); *Industrial Home-Work Conditions in the Candlewick-Bedspread and Lace Industries*, Children's Bureau, United States Department of Labor, pp. 2–4 (May, 1941); *A Study of Industrial Homework in the Summer and Fall of 1934*, A Preliminary Report to the National Recovery Administration, United States Department of Labor, pp. 3268–5, 3268–6, 3268–44 to 3268–46, 3268–54 to 3268–59, 3268–61 (1934); *Aspects of Industrial Homework in Apparel Trades*, by Lazare Teper and Nathan Weinberg, Research Department, International Ladies' Garment Workers' Union, pp. 14–19, 28–31 (July, 1941); *An Industry Adjusts; a study of the adjustment of the artificial flower industry to homework order no. 3*, Division of Women in Industry and Minimum Wage, New York State Department of Labor, pp. 21–30 (June, 1941).

In the federal sphere the need had been recognized in 1933. Under the National Recovery Administration, homework was prohibited in many industries, including four branches of the embroideries industry (R. 137), because it threatened the attempt to establish fair minimum wages: "Manufacturers who favored the code clauses prohibiting homework were usually motivated by a desire to eliminate homework as a source of 'unfair competition.' Organized labor * * * opposed homework as a menace to higher standards of wages and hours and improved working conditions." (*Rosenzweig, op. cit. supra*, p. 34).

State legislation contemporary with the Fair Labor Standards Act also reveals that there was general recognition of the fact that under some conditions the regulation or prohibition of homework is essential to safeguard a minimum wage rate fixed by statute or administrative order. Section 351 of the New York Labor Code, which was first enacted in 1935, forbids industrial homework except in industries where conditions permit its continuance "without unduly jeopardizing the factory workers in such industries as to both wages and working conditions." The New Jersey Act of July 28, 1941 (Laws of 1941, c. 308), which added to earlier labor legislation, declared—

> 1. (a) * * * that industrial homework runs counter to, and tends to defeat, the purpose of these laws because it is per-

> formed at excessively low wages for long and irregular hours, under insanitary and otherwise unhealthful working conditions, in constant competition with factory production and free from effective regulation; that these factors result in * * * (2) the breakdown of standards of employment for factory workers in this State, (3) rendering more difficult the enforcement of laws governing the standards of employment for such factory workers. (4) unfair competition between employers in factory production and employers utilizing industrial homework * * *.

Similar statutes designed very largely to protect minimum wage legislation by the restriction of homework were also in force in other industrial States. See Acts and Resolves of Massachusetts, 1937, c. 429; Laws of Pennsylvania, 1937, Act No. 176; New Jersey, Laws of 1941, c. 308; General Laws of Rhode Island, 1938, c. 293; cf. California Laws of 1939, c. 809.

The Rhode Island regulations during 1937 and 1938 furnished for Congress precise examples of the kinds of terms and conditions necessary to effectuate wage orders, and were therefore exact precedents for Section 8 (f) of the Fair Labor Standards Act. The Rhode Island minimum wage law enacted in 1936 (Pub. Laws, 1936, c. 2289) provided for the formulation of minimum wage orders under a procedure generally similar to that of the Fair Labor Standards Act. It made

no reference to homework or its prohibition. Section 9 provided, however, that the minimum wage orders—

> shall include such proposed administrative regulations as the director may deem appropriate to implement the report of the wage board and to safeguard the minimum fair wage standards established.

Under that section, the director included in the wage order for jewelry manufacturing occupations, effective August 1, 1937, this provision:

> Jewelry homework is hereby prohibited. No licenses or certificates will be issued for homework in this industry unless such work is provided for persons physically handicapped by age or disability in accordance with the provisions of Public Law, 1936, Chapter 2328.[13]

Underlying this order was a unanimous report of the Rhode Island wage board for the Jewelry Manufacturing Industry which stated:

> The Wage Board recognizes that the distribution of industrial homework constitutes a major obstacle to the efficient administration of any minimum wage order, first because the enforcement of a minimum

[13] Mandatory Minimum Wage Order No. 1, effective August 1, 1937, applying to Jewelry Manufacturing Occupations, Department of Labor, Division of Women and Children, R. I., Minimum Fair Wage Rates for Women and Minors Employed in This Occupation.

> wage depends upon accurate hour records which in practice cannot be obtained from homeworkers, second, because homework may be of a character which is not done in the factory distributing such work, making it difficult to determine whether piece rates for such work will yield the minimum hourly rate [Transcript of Hearing before the Rhode Island director, p. 88].

Acting under the same power to safeguard minimum wage rates, the director also included a prohibition against homework in the wage order for wearing apparel and allied occupations, effective April 25, 1938.[14]

These laws and administrative orders were in force in 1938 when the Fair Labor Standards Act was being considered by the Congress. They had been adopted by important industrial States. Surely, therefore, Section 8 (f) must be read with this industrial and legislative background in mind. It is not to be assumed that Congress was ignorant of it, or acted without regard to its teachings. The only reasonable conclusion is that Congress intended, by the unqualified language of

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[14] Mandatory Minimum Wage Order No. 2, effective April 25, 1938, applying to Wearing Apparel and Allied Occupations, Department of Labor, Division of Women and Children, R. I., Minimum Fair Wage Rates for Women and Minors Employed in These Occupations.

Section 8 (f), to grant to the Administrator the authority to include in his wage orders, when necessary, any of the measures which experience under the National Recovery Act and state laws, as well as in industry, had already shown might be essential to prevent evasion and safeguard the minimum wage rates. One measure had been to prohibit the employment of industrial workers to labor in their homes. Even in the absence of affirmative evidence in the legislative history, therefore, it would be a fair inference that Congress intended to authorize the adoption of that measure here.

It is unnecessary, however, to rely on inference exclusively. The legislative history of the Act does show that Congress realized that provisions regulating or prohibiting homework are among the terms and conditions authorized by Section 8 (f). Such provisions were expressly mentioned in various prints of the bill itself as illustrations of the kind of terms and conditions that Section 8 (f) authorized, and the final omission of the illustrations occurred under such circumstances as to make it clear that the change was merely an improvement in draftsmanship without a change in sense.

The basic principle of the original Black-Connery bill was that minimum wage rates, wage

differentials and maximum hour limitations should be established by a Labor Standards Board through the issuance of labor standard orders. The bill, when it passed the Senate, provided that the administrative wage orders—

> shall contain such terms and conditions (including the restriction or prohibition of industrial home work or of such other acts or practices) as the Board finds necessary or appropriate to carry out the purposes of such order[s], to prevent the circumvention or evasion thereof and to safeguard the fair labor standards therein established.

The illustrative parenthetical phrase without the reference to homework—*i. e.*, "(including the restriction or prohibition of such acts or practices)"—had been inserted in committee (S. Rep. No. 884, 75th Cong., 1st sess., p. 8).[15] The express

[15] Nothing occurred at the Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor which throws light on the meaning of Section 8 (f). Most of the testimony relating to the subject of industrial homework was offered in support of a provision that would authorize the proposed Labor Standards Board to deal with homework as a threat to safety, health and child welfare, independently of its relation to minimum wage rates. See pp. 63–66, *infra*. The Secretary of Labor, however, testified that: "Another method of evading the provisions of wage and hour legislation is by the use of industrial homework. I, therefore, think we should have an amendment here which would give the Board, upon an appropriate finding of fact, the power to prohibit entirely

reference to industrial homework was inserted on the floor without comment or opposition (81 Cong. Rec. 7891). Obviously, the Senate regarded provisions restricting or prohibiting industrial homework as among the terms and conditions which the Administrator might find it necessary to include in a wage order in order to safeguard the minimum wage. And doubtless the Senate would not have accepted the amendment so readily if it had not realized that the power was already granted by the more general words.

The House Committee on Labor approved this provision in the form in which it passed the Senate. It was included in the first bill reported and considered on the floor of the House.[16] Even after the bill was recommitted to the Committee on Labor the same language was retained through many revisions.[17] Finally, in the Confidential

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the use of industrial homework * * *." (Joint Hearings, p. 184.) At a subsequent point in her testimony (p. 190), the Secretary made it plain that she was not expressing an expert opinion on whether the language already in the bill was adequate. Consequently, the failure of the Senate Committee to adopt the express provision that the Secretary suggested is probably due to its having concluded that Section 9 (6) of the bill reported contained power to deal not only with industrial homework but also with all other evasive acts and practices, making express mention of homework unnecessary.

[16] Section 9 (6), House Committee Print of August 5, 1937; Section 9 (6), as reported August 6, 1937, with H. Rep. No. 1452, 75th Cong., 1st sess.

[17] See, e. g., Section 9 (6), House Confidential Committee Prints of December 7, 1937, December 14, 1937, and December 17, 1937.

Subcommittee Print "A" of February 18, 1938, a change was made which added still further examples of "such terms and conditions"; as modified the provision read:

> (3) shall contain such terms and conditions (including the restriction or prohibition of industrial home work or such other acts or practices and such requirements as the keeping of records, labeling, periodic reporting and posting of orders and schedules) as are deemed necessary to carry out the purpose of such order and prevent the circumvention or evasion thereof, or to safeguard the standards therein established.

Shortly before passage, the entire scheme of the House bill was changed. The Senate bill and the first bills reported by the House Committee on Labor had proposed the creation of a Board having the power to issue administrative orders establishing minimum wage standards. The House Committee on Labor abandoned that plan after several defeats in the House, and reported a bill which would fix specific statutory minima and contained no provision for administrative orders. S. 2475 as reported by Committee on Labor, H. Rep. No. 2182, 75th Cong., 3d sess. Consequently, this bill also omitted the provision made in the Senate bill for including in the administrative orders the terms and conditions necessary to their enforcement.

While this draft of the bill was being debated in the House, Congressman Ramspeck offered a substitute which was framed on the theory of the Senate bill and the earlier House Committee proposals, and which, therefore, included the same provision for incidental terms and conditions that was in the Senate bill (83 Cong. Rec. 7373–7378). This is the amendment referred to on pages 7 and 14 of the petition for certiorari. The entire substitute was rejected by the Committee and by the House. The clause dealing with homework was a small and comparatively unimportant provision in the substitute bill. It was never separately considered. The defeat of the substitute is not the slightest evidence that the House determined to withhold from the Administrator the power to prohibit homework even if the prohibition should be a necessary incident to the establishment of a decent minimum wage.

The House approved the bill reported by its Committee on Labor, and, in Conference, a compromise was worked out between the Senate plan for administrative regulation of wages and the House proposal for fixed statutory minima. The Conference bill proposed the fixed statutory standards which are set forth in Section 6 of the Act, but supplemented them with the administrative procedure, now found in Section 8, for raising the minimum rate up to 40 cents an hour by the issuance of administrative wage orders.

The Conference bill included *in haec verba* the provisions which are now Section 8 (f).

Neither the Conference Report (H. Rep. No. 2738, 75th Cong., 3d sess.) nor the ensuing debate, reveals the reason for omitting from Section 8 (f) the parenthetical illustrations that the Senate had approved unanimously and the House Committee on Labor had accepted repeatedly as appropriate in any bill making provision for wage orders. Petitioners' argument that the deletion shows a desire to limit the power of the Administrator proves too much. In the House, the parenthesis spoke at various times of "industrial home work," "other acts or practices," "the keeping of records, labeling, periodic reporting" and the "posting of orders and schedules." It seems quite plain that the omission of these illustrations does not deprive the Administrator of the power to include in his wage orders provisions dealing with evasive "acts or practices," "record keeping," or "reporting," or "labeling," or "posting of orders and wage schedules."[18] In

[18] The discussion on pages 13–15 and 24–25 of petitioners' brief concerning the provisions in the various drafts of the bill for labeling and posting is somewhat misleading. What happened was as follows:

As we have said, the bill which passed the Senate contained in Section 9 (6) a general grant of authority to include in labor standard orders "such terms and conditions (including the restriction or prohibition of industrial homework or of such other acts or practices) as the Board finds necessary to carry out the purposes of such order * * *". In addition, Section 14 contained special provisions author-

the Senate bill the parenthesis spoke of the "prohibition of industrial home work or of such other acts or practices" as the Administrator found necessary to prevent evasion of his wage orders. Surely it will be conceded that by deleting the parenthesis the Conference Committee

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izing the Administrator to require (a) the posting of labor standard orders, (b) posting of a schedule of hours of employment in operation at an establishment and (c) the labeling of goods with all the information deemed by the Board necessary or appropriate to aid in the enforcement of any provision of the act or any order thereunder. The House Committee on Labor in its first report proposed amendments striking out the provision for labeling but it stated specifically that the bill provided for the posting of orders. H. Rep. No. 1452, 75th Cong., 1st sess., p. 18. On the floor, Congressman Ramspeck proposed to strike out the provision requiring the posting of schedules of hours of employment and the amendment was accepted (82 Cong. Rec. 1821). Congressman Ramspeck did not suggest, however, that the provision, in Section 14 (a), for the posting of administrative orders, which would include any wage schedules in the orders, should be deleted from the bill, and this provision was retained. Thereafter, the bill was recommitted to the Committee on Labor (82 Cong. Rec. 1835).

Subsequently, in considering various confidential prints of the bill, the Subcommittee of the House Committee on Labor inserted the parenthetical illustrations relating to labeling and the posting of orders and schedules. See p. 45, *supra*. As stated above, these provisions were retained by the Committee until the whole theory of the House bill was changed. Moreover, despite petitioners' criticism (Br. 15, n. 11), our memorandum in response to the petition for certiorari was entirely accurate in stating that all the parenthetical illustrations—both those in the Senate bill and those considered by the House Committee on Labor—were omitted from Section 8 (f) by the Conference Committee without comment.

This legislative history shows only that the House was opposed to requiring that schedules of hours of employment

did not signify its intention that the Administrator should be powerless to restrict or prohibit any evasive "acts or practices." Yet all the illustrations were deleted without comment and there is no basis for assuming that the Conference Committee intended the deletion of some to work a substantive change and the deletion of others to have no significance.

The true explanation of the omission must be that the draftsmen sought to clarify Section 8 (f) by omitting illustrations which had become so cumbersome that there was danger that they might cloud the essentially simple purpose of the section. All draftsmen are familiar with the maxim *expressio unius exclusio alterius*, and there was danger that the express mention of some specific terms and conditions authorized by the section would lead to the conclusion that others, or a different kind, were outside the delegated power. It is true, of course, as petitioners point out, that today the *Phelps Dodge* case and *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95, 100, would probably be a sufficient answer to any such contention; those decisions show that the word "including" introduces only an illustrative application of a general principle. But in 1938, those cases had

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be posted, a power which, so far as we are aware, no one has ever suggested that the Administrator can exercise. The Administrator has exercised the power to require the posting of wage orders in every order which has been issued under the statute.

not been decided and the reality of the danger which the draftsman sought to avoid is demonstrated by the force with which the argument was made in the *Phelps Dodge* case (see 313 U. S. 177, 188–189, 211) and by the decision of the lower court in *Federal Land Bank* v. *Bismarck Co.*[19] The significant point in this legislative history, therefore, is not the deletion of the parenthetical illustrations. The significant point is that the use of the illustrations in the earlier drafts clearly demonstrates that Congress knew that industrial homework was one kind of evasive act or practice that the language of Section 8 (f) was broad enough to cover; and, by adopting that language, Congress showed that it desired that power to deal with homework be included in the authority granted.

Nothing contrary to this conclusion appears in the subsequent history of the Act. Petitioners point out (Br. 17) that in 1939, the Administrator requested a series of amendments, one of which would have given him authority to make "such regulations and orders as are necessary or appropriate to carry out the provisions of this Act * * * including the restriction of homework to the extent necessary to safeguard the minimum standards provided in the statute." H. R. 5435, 76th Cong., 1st sess., Sec. 4. The House Committee on Labor stated in its report (H. Rep. No. 522, 76th Cong., 1st sess., p. 8) that

[19] 70 N. D. 607.

> As the act is now written, it is extremely doubtful whether the wage-and-hour standards which it establishes can be enforced as to industrial homeworkers.

Petitioners conclude from this evidence that the failure of the bill to pass indicates that, in 1938, the Congress which enacted Section 8 (f) did not intend the Administrator to prohibit homework even though the prohibition might be necessary to prevent evasion of the rates established by his wage orders.

But the proposed amendment, read with the committee report, seems to refer to the Administrator's power to promulgate safeguarding regulations protecting not the rates fixed by his wage order, with which we are here concerned, but the rates fixed by Section 6 itself (See *infra*, pp. 53–59, 67–78). It is idle to speculate, however, as to whether the Administrator sought, by this amendment, to remove doubts as to his authority to deal with homework in a wage order, or to make sure that he had the power to safeguard the minimum wage rates established not by wage order but by the statute.[20] The Administrator's desire

[20] Likewise, no inferences can be drawn from the model minimum wage and hour bill and publications of the Division of Labor Standards, United States Department of Labor, quoted by petitioners at pages 17–18 of their brief. Both were drawn up after the Fair Labor Standards Act became law. Indeed, if this kind of inquiry were permissible, it would be more than offset by the evidence, brought out by counsel for the petitioners at the hearings before the Ad-

for clarification and assurance is understandable; this case itself and the diversity of views in the court below stand as *ex post facto* justification for his caution. And the failure of Congress, in 1939, to pass the Norton bill (H. R. 5435, *supra*), which included a wide variety of provisions, is no evidence whatever that Congress, in 1938, withheld the power here claimed under Section 8 (f). Indeed, the only Congressional debate on H. R. 5435 indicates that it was opposed by a majority of the House, which refused to order a second, because of the belief that it would "take away some of the exemptions that so-called farm people enjoy under the act." 84 Cong. Rec. 6620–6622. Congressional rejection of the Norton bill is even less relevant in determining the meaning of Section 8 (f) than is the enactment of a subsequent statute which provides specifically for that which could only be inferred before. Cf. *United States* v. *Lowden*, 308 U. S. 225, 239; *Higgins* v. *Smith*, 308 U. S. 473, 479–480.

C. *The other provisions of the Act cast no doubt on our interpretation of Section 8 (f).*

Petitioners place great reliance upon the incongruities which they say that our interpreta-

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ministrator on the present wage order, which showed that officials of the Department of Labor were assured at the time of the passage of the original act that Section 8 (f) granted authority to prohibit homework in a proper case. See Transcript of Hearings before the Administrator, pp. 186–191. (A copy of this transcript is lodged with the Clerk of this Court.)

tion of Section 8 (f) would create. Thus, they lay great stress on the absence of any provision in the Act which would enable the Administrator to prohibit homework in order to prevent evasion of the statutory minimum wage rates in the absence of an applicable wage order (Br. 22–25). Petitioners emphasize the contrast by arguing that the power of the Administrator to issue wage orders will terminate for all practical purposes only eleven months hence, on October 23, 1945, when, they contend, they will be free to resume the practice of distributing industrial homework. One complete answer, which we discuss below at greater length, is suggested by the opinion of Judge Learned Hand (R. 219–221): Section 8 should be read as granting power to prevent evasion of the wage rates after as well as before October 23, 1945.

A second answer is given in Judge Frank's opinion (R. 200–202). Lack of power to prohibit homework in order to protect the statutory wage rates would not prove that there is no power so to protect the rates fixed by wage order. Under Section 8 (f) all evasive acts and practices stand on the same footing, and the absence from Section 6 of any analogue expressly authorizing the Administrator to regulate practices evasive of the statutory rates surely does not show that Congress intended Section 8 (f) to be wholly nugatory. The undoubted power, granted by Section

8 (f), to prohibit evasive acts and practices and to require that wage orders be posted cannot be denied because Section 6 grants no like authority to the Administrator to prevent circumvention and evasion of its minimum wage rates. The Act was a compromise between conflicting proposals. It would not be surprising, therefore, to find that a power given to the Administrator in connection with his authority to issue administrative wage orders was not conferred in those parts of the bill which were drawn from the House proposal to fix rigid statutory rates without administrative action. "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive." See *Addison* v. *Holly Hill Fruit Products, Inc.*, No. 217, last Term, decided June 15, 1944, slip sheet, p. 8. Neither is the existence of a possible defect or the absence of perfect symmetry sufficient reason for narrowing a statute by restricting a power that the words have plainly granted.

Judge Learned Hand expressed the opinion that this reading of the statute ascribed to Congress absurdity of purpose because the consequences of the prohibition of homework would be felt long after the industry would be free to

resume it. But his opinion on this point, we believe, exaggerates the injury to the industry, in disregard of the Administrator's findings, and minimizes the good to be achieved by the prohibition of homework for even a short period. (See pp. 10–18 *supra*). No such disastrous consequences have been suffered in other industries in which homework has been prohibited by wage order.[21] Furthermore, Section 8 (f) should not be read as if it had been enacted to cover only the period for which this wage order will be effective. In 1938, when the Act became effective, wage orders had seven years to run. Orders covering other industries, which contain prohibitions of homework, have been in force for several years.[22] Surely it is not to ascribe an unreasonable intent to Congress to conclude that it conferred authority upon the Administrator to prohibit homework and to take other similar action in order to prevent evasion of wage orders for a seven year period, even though it may not have dealt with the danger of evasion in the more distant future. And the propriety of a particular exercise of the power towards the end of the seven year period is a matter of policy for the Administrator to decide.

On this point, moreover, it is also important to note that the inconsistency, if any, between the

[21] See *supra*, note 3.

[22] See *supra*, note 3.

powers of the Administrator under Section 8 (f), as we construe it, and his power after October 23, 1945, to prevent evasion of the statutory wage rates, is not as great as petitioners imply. Even if Judge Learned Hand's interpretation of Section 8 is rejected, the Administrator will not be altogether helpless in dealing with industrial homework and other evasive acts and practices leading to violations of the minimum wage. Section 11 authorizes him to "investigate and gather data regarding the wages, hours, *and other conditions and practices of employment* in any industry subject to this Act, and * * * [to] *investigate such facts, conditions, practices, or matters* as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, *or which may aid in the enforcement* of this Act" [italics supplied]. Section 15 of the Act declares it unlawful to fail to pay the minimum wage rates specified in Section 6, and Section 17 grants the Administrator power to invoke the aid of the district courts "to restrain violations of section 15." This provision must be read to afford "a full opportunity for equity courts to treat enforcement proceedings * * * in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect" (*Hecht Co.* v. *Bowles*, 321 U. S. 321, 330). Consequently, upon finding, in an investigation pur-

suant to Section 11, that an employer's practice of distributing homework is leading to violations of the statutory minimum wage rates, and that to halt the violations the distribution of homework must be terminated, the Administrator can prove these facts and secure in the district court a decree enjoining not only the wage violations but also the distribution of the homework. Cf. *Warner & Co.* v. *Lilly & Co.*, 265 U. S. 526, 532; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 461.

There is no novelty in this suggestion. The statutory right to an injunction restraining violations of a public law normally includes the right to other equitable relief necessary to make the injunction effective. The Sherman Act, for example, in terms invests the courts merely "with jurisdiction to prevent and restrain violations of this Act" (26 Stat. 209, 15 U. S. C. 4). Under this provision, however, the courts have traditionally exercised a wide variety of equity powers, including the power to restrain acts otherwise lawful where necessary to prevent continued violations of the statute. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 77–82; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 184–188; *Local 167* v. *United States*, 291 U. S. 293; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436; *United States* v. *Univis Lens Co.*, 316 U. S. 241, 254. "The test is whether or not the required

action reasonably tends to dissipate the restraints and prevent evasions. Doubts are 'to be resolved in favor of the Government * * *'" *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 726.

Similar remedies are available under Section 17 of the Fair Labor Standards Act. The courts are not to restrain only the actual violations of Section 15, *i. e.* of the minimum wage rates, and to leave employers free to follow the evasive practices which have brought about violations in the past and will make enforcement impracticable in the future. The Administrator's findings, which are unchallenged, show that homework is such a practice and that its continuance would make enforcement of the minimum wage rate impossible. Upon proving those facts in a court of equity, the court would deal, therefore, not only with the actual violations but also with the root of the evil. The principles followed under the Sherman Act must be equally controlling under Section 17.

Undoubtedly, this method of preventing violation of the statutory minimum wage rates in the employment of homeworkers would be cumbersome and expensive, for presumably the Administrator would have to proceed against each employer individually and prove the need for the prohibition in each individual case. If Judge Learned Hand's view be rejected, there is an undeniable difference between the Administrator's power to protect the statutory wage rates in a

court of equity and his power under Section 8 (f), as we construe it, to prevent evasion of rates fixed by a wage order. But the existence of even such an unsatisfactory remedy for dealing with homework as a source of evasion of the statutory rates shows that the inconsistency is no greater than might be expected in an act which, as the result of a practical legislative compromise, combines a seven-year period of administrative wage regulation with a future period of rigid statutory wage rates. Petitioners' interpretation (Br. 25) would read Section 8 (f) out of the statute by reducing it to a duplication of Section 11. If any inconsistency exists, it is present not only with respect to the prohibition of homework but also with respect to all measures which Section 8 (f) on its face authorizes the Administrator to adopt in order to prevent evasion. Only two alternatives would be open. One is to recognize frankly that the practical legislative compromise did not result in perfect symmetry. The other is to satisfy the desire for symmetry by striking from the Act the provisions of Section 8 (f) expressly granting the Administrator the authority to make the wage order minima effective. Plainly, as Judge Frank concluded, the former course should be adopted.

Petitioners also argue (Br. 25–26) that the Act provides no method for enforcement of the prohibition of industrial homework and that, therefore, Congress cannot be supposed to have authorized the Administrator to include such a pro-

hibition in a wage order even though it may be as essential as the Administrator has found. The argument is as follows: Section 15, entitled "prohibited acts", does not declare a violation of the terms and conditions included in a wage order pursuant to Section 8 (f) to be unlawful but, with respect to wage orders, merely provides that it shall be unlawful to violate Section 6. The only relevant part of Section 6, sub-section (a) (4), provides that employers shall pay "not less than the rate * * * prescribed in the applicable order of the Administrator issued under section 8." Therefore, petitioners say, only the wage rate and not the incidental prohibition against homework can be enforced. This shows, they say, that Congress cannot have intended the vain prohibition.

The short answer to this contention is that, like so much of petitioners' argument, it would delete Section 8 (f) from the statute and leave the Administrator powerless to include in his wage orders any provisions, other than record-keeping requirements (Section 11 (c)), necessary to prevent their evasion. What petitioners say with respect to the prohibition of homework may be said with equal force concerning any other term or condition which the Administrator finds necessary to prevent evasion of a wage order. If the Administrator cannot enforce the prohibition of homework, he cannot enforce terms or conditions providing for posting orders and notices, or any other measures directed against evasive acts and prac-

tices. This is not what Congress intended. Section 8 (f) cannot be read entirely out of the statute. When Congress explicitly required the Administrator to include in wage orders "such terms and conditions as the Administrator finds necessary to carry out the purpose of such orders, to prevent the circumvention or evasion thereof * * *" (Section 8 (f)), it obviously intended to impose an obligation on employers to comply with all the terms of the orders. Consequently, even if no remedy for breach of the obligation were specifically prescribed by the Act, the courts would not hesitate to supply one. *Texas & New Orleans R. R.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548.

It is clear, however, that such a remedy is provided by Section 17. Failure to pay the wage rate specified in an order issued under Section 8 is a violation of Sections 6 (a) (4) and 15. The terms and conditions included in the wage order, such as the provisions in the order before the Court requiring the posting of notices and prohibiting the distribution of industrial homework, are not independent measures; they are incidental provisions necessary to prevent nonpayment of the wage rate in violation of Section 15. Section 17 is a broad grant of "jurisdiction * * * to restrain violations of section 15." The *remedy* which may be granted is not limited to a decree reciting that the defendant shall not violate Section 15. Equity, in order to prevent the violations, will

go farther and include in the decree such terms and conditions as are necessary to prevent circumvention or evasion and to safeguard the wage rates that Sections 6 (a) (4) and 15 establish. See pp. 55–58, *supra*, and authorities cited; compare *California Drive-In Restaurant Ass'n* v. *Clark*, 22 Cal. (2d) 287. Certainly, therefore, in view of the relationship between court and administrative agency,[23] we are warranted in reading the grant of "jurisdiction to restrain violations of Section 15" as broad enough to authorize the courts to enforce those incidental terms and conditions compliance with which the Administrator has found to be necessary if violations of Section 15 are to be effectively prevented.[24]

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[23] See *United States* v. *Morgan*, 307 U. S. 183, 191, *et seq.*; *Hecht Co.* v. *Bowles*, 321 U. S. 321, 330–331; *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 197.

[24] While the point need not be decided, it would seem that the criminal sanctions provided by Section 16 (a) may be invoked in case any of the provisions of a wage order are violated. Although Section 6 provides only that an employer shall pay his employees "not less than the rate * * * prescribed in the applicable order of the Administrator under section 8", the fair intendment of the Act viewed as a whole is that it shall be unlawful to violate any of the incidental provisions of a wage order. Such provisions are so much a part of a wage rate that it has been held that "the power to provide safeguards to insure the receipt of the minimum wage and to prevent evasion and subterfuge, is necessarily an implied power flowing from the power to fix a minimum wage delegated to the commission". *California Drive-In Restaurant Ass'n* v. *Clark*, 22 Cal. (2d) 287, 302. So here, Congress may well have regarded compliance with the incidental terms embodied in wage orders under Section 8 (f) as being

D. *The failure of Congress to provide for the regulation or prohibition of industrial home work as it did for child labor does not show that the Administrator lacks power to prohibit it when necessary to prevent the circumvention or evasion of a wage order.*

Petitioners argue that in view of the importance of homework and the attention directed to it at the Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor, Congress, if it intended the Administrator to deal with the evil,

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in substance an essential part of any payment of the prescribed minimum wages. In that event, in addition to enforcing the prohibition in a court of equity under Section 17, the Government could invoke the criminal sanctions available under Section 16 (a) for nonpayment of the minimum wage rate.

There is support for this analysis in the legislative history of the Norton Bill which was introduced at the session following the enactment of the Fair Labor Standards Act (discussed on pp. 50–52, *supra*). One of the amendments proposed in that bill would have made it a violation of Section 15 to violate "any of the provisions of any regulation or order of the Administrator issued pursuant to the provisions of this Act." In reporting the bill, the Committee explained that the amendment was necessary in the event that the Administrator were given a general rule making power "so that the violation of appropriate regulations will be prohibited." It explained that there also was, in the proposed amendment,—

> A prohibition against violations of the provisions of any wage order issued by the Administrator pursuant to section 8. *This latter prohibition clarifies the act as now written.* [Italics supplied.]

See H. Rep. No. 522, 76th Cong., 1st sess., p. 10.

would have enacted broad regulatory provisions as it did in dealing with child labor (Br. 12–13, 26–27); from this premise, petitioners conclude that the Administrator has no power to prohibit homework as a means of preventing evasion of the minimum wage rates. The argument, we submit, wholly misconceives the nature of the Administrator's action in the instant case and the extent of the power which we claim for him. Industrial homework may be regulated either as an independent subject or, when necessary, as a means of safeguarding minimum wage rates. Quite apart from enforcement of minimum wage laws, homework has been regulated by the States because, even when proper wages are paid, its distribution tends to create unsatisfactory conditions dangerous to health and to encourage harmful child labor. Such prohibitions, unlike that involved in this case, may be imposed whether or not their imposition totally disrupts an industry which can be carried on only by the utilization of homeworkers, and even if the compensation of employees in the industry is far above the prescribed minimum. Thus there are many state laws regulating or forbidding homework without regard to its effect upon minimum wages. See, e. g., Ill. Rev. Stat. (1941) Ch. 48, Secs. 251–260; Laws of Pennsylvania (1937), Act. No. 176, Secs. 1, 4; Vernon's Texas Statutes, Cum. Supp. (1939), Tit. 12, Ch. 11, Art. 782a, Secs. 2, 3. Compare Acts and Resolves of Massachusetts (1937), Ch. 429,

Sec. 144 (the text of which appears in note 11, *supra*). It was with this aspect of homework as an independent evil that most of the witnesses were concerned in their testimony at the Joint Hearings. See Joint Hearings on S. 2475 and H. R. 7200, 75th Cong., 1st sess., pp. 402, 408, 409, 432. If Congress had intended to authorize that kind of regulation, doubtless, as in the case of the child labor provisions (Section 12), it would have done so in express terms. Such a provision would, of course, be different in scope and in consequence from the Administrator's power under Section 8 (f) to prevent evasion of wage rates established by order. The Senate Committee on Education and Labor, however, restricted the bill to the establishment of minimum wages and maximum hours and the prohibition of industrial child labor, and omitted any provisions dealing with homework as an independent evil. (S. Rep. No. 884, 75th Cong., 1st sess., p. 4.) We do not contend that the Administrator has any power to regulate homework independently of the regulation of wages, and he has not sought to exercise it. The power of the Administrator was confined to the regulation of wages and hours and to taking steps necessary to enforce his regulations. He was given authority to regulate homework only as a means of preventing evasion of a wage order which would render the wage rate a nullity, just as he might deal with any other evasive act or practice.

These same considerations answer petitioners' argument that if Congress had intended to authorize the Administrator to take such serious action as to regulate or prohibit industrial homework, it would have required him to consult the industry committees and hold hearings as he does before fixing a wage rate. Since the terms and conditions inserted in a wage order pursuant to Section 8 (f) must relate to the enforcement of the wage rate, it was quite natural for Congress to leave the selection of those terms to the Administrator, who is the enforcing official. Moreover, there are so many provisions in the Act which delegate to the Administrator alone more authority than he has sought to exercise under Section 8 (f) that the failure of Congress to require consultation with an industry committee cannot be regarded as evidence that the authority granted by Section 8 (f) extends only to trivial matters. For example, as Judge Frank pointed out in the court below, the definitions and determinations which the Administrator might make under Sections 7 (c) and 13 without consultation or hearings have far more extensive consequences than the prohibition of industrial homework (R. 202).

In conclusion, we submit, therefore, that there is no force to the arguments by which petitioners seek to read into Section 8 (f) a limitation which is not present. "While one may not end with the words of a disputed statute, one certainly begins there." *Federal Trade Commission* v. *Bunte*

Bros., 312 U. S. 349, 350. Section 8 (f) should be given the full scope of its words, which plainly authorize the Administrator to include in wage orders "such terms and conditions" as he finds "necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein." The background of social and economic thought reflected in the N. R. A. and state legislation shows that when the Fair Labor Standards Act was before Congress it was generally realized that in some industries the prohibition of homework was "necessary" to the effectiveness of minimum wage regulation. Congress, when it built up a parenthetical list of some of the powers that the general words of Section 8 (f) have granted, mentioned as one illustration the power to prohibit industrial homework. It follows, we submit, that Section 8 (f) should be held to grant the power which the Administrator sought to exercise in the wage order under review.

II

THE PROHIBITION AGAINST THE DISTRIBUTION OF INDUSTRIAL HOME WORK WILL REMAIN EFFECTIVE AFTER OCTOBER 23, 1945.

Section 8 (e) of the Fair Labor Standards Act provides—

> No order issued under this section with respect to any industry prior to the expira-

> tion of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order; as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

The power granted to the Administrator to insert "necessary" terms and conditions is limited by Section 8 (f) to "orders issued under this section." In view of these provisions, Judge Learned Hand raised the question in the circuit court of appeals as to whether the Administrator's power to prohibit homework in order to safeguard minimum wage rates would not expire altogether on October 23, 1945, seven years after the Act became effective.

We believe that it is unnecessary to decide this question in the present case. The extent of the Administrator's powers to prevent evasion of the wage rates after October 23, 1945, upon termination of the wage orders, throws little light on the extent of his powers under Section 8 (f) in issuing wage orders. As we have shown, under Section 8 (f) all evasive acts and practices stand

on the same footing; homework no different from the others. Consequently, the logic that would require the conclusion that Section 8 (f) grants no power to include a "necessary" term dealing with homework as a menace to a wage order rate because the power would expire after seven years, would also require the conclusion that the Administrator has no power to include any necessary terms and conditions whatsoever because the power to include them does not extend to protection of the statutory wage rates and would expire after the seven year period. Manifestly, this is unsound; Section 8 (f) cannot be stripped of all vitality and read out of the statute. The only reasonable conclusion is that however inadequate the Administrator's power may be thereafter, Section 8 (f) does grant him power during the first seven years to deal with any evasive acts or practices; and that this authority includes power to deal with industrial homework, a practice which if left unregulated would gut the wage order for the embroideries industry. See pp. 10–15, *supra*. Hence, whichever way the issue raised by Judge Learned Hand's opinion might be decided, the wage order in question should be upheld. This is sufficient reason for the Court to refrain from deciding the broader issue in the present case.

We believe it appropriate, however, since the question has been raised, for us to amplify the

considerations which led Judge Learned Hand to conclude that Section 8 (f) authorizes the Administrator to enforce measures preventing the frustration of minimum wage regulation not only before October 23, 1945, but also after that date. We submit that this conclusion is correct.

First, it is important to note that the Administrator was given substantially all the power necessary to adopt terms and conditions required to prevent circumvention of the minimum wage rates during the initial seven year period. The intention of Congress was that the effective minimum wage rates should be fixed by administrative proceedings industry by industry. Apparently, the 25 and 30 cent rates specified in Section 6 were not considered as substitutes for administrative action but primarily as a floor below which the industry committees could not go in fixing the rates for the industry. Thus, Section 8 (a) provides that "with a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour * * * the Administrator *shall from time to time* convene the industry committee for each such industry, and the industry committee *shall from time to time* recommend the minimum wage rate or rates

of wages to be paid under section 6 * * *." [Italics supplied.] Likewise, the Chairman of the House Committee on Labor stated, in explaining the Conference Report (83 Cong. Rec. 9256):

> Between the absolute floor of 30 cents an hour after the first year and the floor of 40 cents an hour after the seventh year, the conference agreement provides for a limited degree of flexibility. The industry committee for each industry is *required* to recommend to the Administrator, and the Administrator is *required* to prescribe by order, the highest minimum-wage rate for the industry which will not substantially curtail employment. And so it is very possible, as I have said before, that the 40-cent wage rate will be reached even during the first or second year in the case of some industries, during the third year in the case of still others, and so forth. [Italics supplied.]

See also 83 Cong. Rec. 9163–9164, 9177, 9255–9266.

In the initial seven year period, therefore, the power granted by Section 8 (f) would be ample to prevent evasion. For the most part the rates would be fixed by wage orders which would contain, pursuant to Section 8 (f), all the terms and conditions necessary to prevent their evasion. If administrative difficulties delayed covering all

industries with wage orders—as actually happened—the Administrator could deal, in an industry which required such treatment, with practices destructive of the statutory rates by calling together the industry committee for the affected industries and fixing a rate by wage order.

It is also plain that Congress must have realized that the Administrator, following the scheme of Section 8 of the Act, would by 1945 have covered all industries with wage orders and have promulgated in the orders the terms and conditions necessary to prevent evasion of the wage rates established. Such measures might include in addition to prohibitions of industrial homework and a requirement for the posting of notices, both of which are illustrated by the wage order in the present case, any of the countless other incidental terms and conditions which state officials have found necessary to make minimum wage regulations effective. Such measures include the regulation of tipping, waiting time, charges for uniforms, the restriction or prohibition of homework, and other similar provisions. They are so indispensable to minimum wage regulation that in *California Drive-In Restaurant Ass'n* v. *Clark*, 22 Cal. (2d) 287, 302, the Supreme Court of California held that the power delegated to the State Commission to fix a minimum wage necessarily carried with it the implied power to stipu-

late that tips might not be included as part of the employee's wages.

The Court is now asked by petitioners to interpret the Act so as to provide that all the necessary enforcement provisions built up by the Administrator in the promulgation of wage orders will become ineffective on October 23, 1945. Section 8 (e) read with strict literalness supports this interpretation for it provides that "no order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration" unless the industry committee recommends and the Administrator finds on a preponderance of the evidence that the continued effectiveness of the order is necessary to prevent substantial curtailment of employment. We submit, however, that no such absurdity was intended by the Congress. Congress fully realized that in many instances the goal of the 40 cent minimum wage rate would be attained before the expiration of seven years. (See statement of the Chairman of the House Committee on Labor, quoted, *supra*, p. 71). In fact, that goal has now been attained, through the wage order program, for all industries. Consequently, the only effect of reading Section 8 (e) as providing that all wage orders and all their terms and conditions

shall become ineffective after seven years, would be to render null the terms and conditions necessary to prevent evasion of the wage rate, and to leave the Administrator powerless thereafter to prevent evasion except as he may obtain the assistance of a court of equity.[25]

Common sense shows that this cannot be the intention. Although Congress used the term "order" in Section 8 (e), it must have been thinking only of the rates fixed by a wage order and not of its incidental provisions. The purpose of Section 8 (e) was to guarantee that attainment of the goal of a universal minimum wage of 40 cents an hour would not be delayed for more than seven years unless it should be definitely established that the rate of 40 cents an hour would substantially curtail employment in an industry. There is no clearer demonstration of this than the explanation of Section 8 (e) made by the Chairman of the Senate Committee on Education and Labor in explaining the conference agreement on the Senate floor. He said (83 Cong. Rec. 9164)—

> Having fixed a rudimentary floor for wages for all industry producing for interstate commerce, we decided to authorize separate and, when substantial curtailment of employment would not result, higher minimum rates (not exceeding 40 cents an hour) to be fixed industry by industry.

[25] See *supra*, pp. 56–59.

> But again *to guard against the forces of inertia we provided that all industries covered by the act must be brought up to a minimum of 40 cents not later than 7 years after the effective date of the act,* unless it should be definitely established by a preponderance of the evidence that such a rate would substantially curtail employment in the industry. [Italics supplied.]

The Chairman of the House Committee on Labor gave a similar explanation of the purpose of the bill (83 Cong. Rec. 9256); and Congressman Ramspeck, who was a member of the committee and also one of the House conferees, pointed out that the effect of Section 8 (e) would be as follows (83 Cong. Rec. 9266)—

> In 7 years it is directed that all wages shall go to 40 cents, the only exception being that if an industry committee finds by a preponderance of the evidence that to do so would create substantial unemployment, then they do not have to put into effect the 40-cent rate for the particular industry.

We submit that Section 8 (e) should be limited to its purpose. The object was to guard against inertia, not to cut short measures indispensable to making minimum wage rates effective. The intention of Congress should be carried out by reading Section 8 (e) as applicable only to those provisions of wage orders which specify wage rates less than 40 cents an hour, and not to the incidental enforce-

ment provisions with which Section 8 (e) is in no substantial sense concerned.[28]

It is manifest that the arguments opposed to this conclusion rest entirely upon the letter of Section 8 (e). They take no account of the wholesale violations of the minimum wage laws which will follow upon termination of the prohibition against homework in this and other needle trades. They ignore the manifest absurdity of concluding that all the terms and conditions which the Administrator has included in wage orders are to become void on October 23, 1945, without possi-

[28] In 1939, in reporting the Norton Bill, the House Committee on Labor referred to the "absence of an authority under the act to issue regulations," and urged that the Administrator be authorized "to make regulations necessary or appropriate to carry out any of the provisions of the act." H. Rep. No. 522, 76th Cong., 1st sess., pp. 7–8. The Committee was particularly concerned with the lack of authority to issue interpretative regulations, such as those promulgated by the Bureau of Internal Revenue, and with the potential civil liability of employers who followed interpretations of the Administrator which the courts later held erroneous. The Committee mentioned, as an illustration, the need for power to interpret such terms as "hours worked." This provision was far broader than any power which we contend the Administrator possesses. We urge not that the Administrator has a general rule-making power, such as the Committee was discussing, but that under Section 8 (f) he has the very narrow power to include, in wage orders, terms and conditions necessary to safeguard the wage rates established, and that these provisions continue in effect even after the wage rate goes by statute to 40 cents an hour. Consequently, the statement of the Committee is not inconsistent with our position.

bility of replacement, even though, in the absence of such terms and conditions, the 40 cent minimum wage rate will often be a nullity. The letter of Section 8 (e) cannot compel this consequence in the face of the plain intendment of the statute. "Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned." The courts "are not forced by the letter to do violence to the spirit and purpose of the statute" (*Sorrells* v. *United States*, 287 U. S. 435, 448). Where the literal reading of general words produces irrational consequences, it is a proper judicial function to avoid such results by reading into the language appropriate exceptions or by limiting the general words to those matters which were the actual subjects of the provisions in question. *United States* v. *Kirby*, 7 Wall. 482; *Holy Trinity Church* v. *United States*, 143 U. S. 457, 459–462; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 392.

Armstrong Co. v. *Nu-Enamel Corp.*, 305 U. S. 315, 326, 333, presented such a question in substantially the same form as it is raised by the present controversy. Section 1 (b) of the Trademark Act of 1920 permitted the registration of certain trademarks not previously registerable "except those specified in paragraphs (a) and (b) of section 5" of the Act of 1905. To have

read this provision literally would have rendered Section 1 (b) of the 1920 Act irrational. Consequently, this Court limited the reference to "paragraphs (a) and (b) of section 5" to those provisions of paragraphs (a) and (b) which were within the intendment of the statute. So here, the Court should interpret the general words, "No order issued under this section * * *" to mean those parts of an order which set the wage rate, and not the terms and conditions with respect to which application of the termination provisions of Section 8 (e) would be glaringly absurd.

Such an interpretation does not go beyond a proper exercise of the judicial function and at the same time gives vitality to minimum wage regulation which, as shown by the Administrator's findings, would otherwise be an empty gesture having no meaning in industries in which it is needed the most.

CONCLUSION

After careful hearings the Administrator found that it would be impossible to establish a 40 cent minimum wage rate in the embroideries industry unless the distribution of industrial homework were curtailed and the work transferred to workshops or factories where the work could be supervised and payment of the minimum guaranteed. Under such circumstances, the prohibition was authorized by Section 8 (f) as a "term or con-

dition" which the Administrator found "necessary to carry out the purposes" of the wage order and "to prevent the circumvention or evasion thereof." The unqualified words of Section 8 (f) should not be read to deny a power which is so indispensable to carrying out the purpose of Congress. The legislative history shows that the power was granted, and the other provisions of the Act, fairly read, do not point to a contrary conclusion.

Therefore, the judgment of the circuit court of appeals should be affirmed.

Respectfully submitted.

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NOVEMBER 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

[PUBLIC—No. 718—75TH CONGRESS]
[CHAPTER 676—3D SESSION]
[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying,

the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodg-

ing, or other facilities are customarily furnished by such employer to his employees.

ADMINISTRATOR

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee,

and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act, the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands.[1]

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress)

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8,

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.[1]

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (c).[1]

MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from

time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such

recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

ATTENDANCE OF WITNESSES

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

COURT REVIEW

SEC. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the

petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

INVESTIGATIONS, INSPECTIONS, AND RECORDS

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize

the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

CHILD LABOR PROVISIONS

SEC. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

EXEMPTIONS

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or

byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.[1]

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

LEARNERS, APPRENTICES, AND HANDICAPPED WORKERS

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any

[1] Amendment provided by Act of August 9, 1939 (Public No. 344, 76th Congress, 53 Stat. 1266).

goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

PENALTIES

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

INJUNCTION PROCEEDINGS

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

RELATION TO OTHER LAWS

SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

SEPARABILITY OF PROVISIONS

SEC. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved, June 25, 1938.

[PUBLIC LAW 283—77TH CONGRESS]

[CHAPTER 461—1ST SESSION]

[S. 1713]

AN ACT

To amend Public Law Numbered 718, Seventy-fifth Congress, approved June 25, 1938.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That paragraph (2) of subsection (b) of section 7 of Public Law Numbered 718, Seventy-fifth Congress, approved June 25, 1938, is hereby amended to read as follows:

"(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand and eighty hours during any period of fifty-two consecutive weeks, or".

Approved, October 29, 1941.